

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JAMES E. PASS

Claimant

VS.

CITY OF MEADE

Respondent

AND

EMPLOYERS MUTUAL CASUALTY COMPANY

Insurance Carrier

AND

KANSAS WORKERS COMPENSATION FUND

Docket No. 163,062

ORDER

ON the 17th day of February, 1994, the claimant's application for review by the Workers Compensation Appeals Board of an Award entered by Administrative Law Judge Thomas F. Richardson dated December 14, 1993, came on for oral argument by telephone conference.

APPEARANCES

Claimant appeared by his attorney, Mike Allen, of Liberal, Kansas. Respondent and insurance carrier appeared by their attorney, Allen G. Glendenning, of Great Bend, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, William W. Jeter, of Hays, Kansas. There were no other appearances.

RECORD

The record as specifically set forth in the Award of the Administrative Law Judge dated December 14, 1993, is hereby adopted by the Appeals Board.

STIPULATIONS

The stipulations as specifically set forth in the Award of the Administrative Law Judge dated December 14, 1993, are herein adopted by the Appeals Board.

ISSUES

The issues presented by oral argument for decision by the Appeals Board are:

- (1) Whether the claimant suffered a personal injury by accident arising out of and in the course of his employment.
- (2) Whether claimant gave proper notice, and if not, whether respondent was prejudiced by lack thereof.
- (3) What is the nature and extent of claimant's disability?
- (4) What is claimant's entitlement to payment of medical expenses?
- (5) What is claimant's entitlement to future medical and future vocational rehabilitation benefits?
- (6) What is the liability, if any, of the Kansas Workers Compensation Fund?

Administrative Law Judge Thomas F. Richardson in his Award dated December 14, 1993, denied claimant workers compensation benefits on the basis that the claimant failed to meet his burden of proof on the threshold issue of whether the claimant suffered a personal injury by accident that arose out of and in the course of his employment with the respondent. Claimant appeals this decision to the Appeals Board.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After considering the arguments of the parties and reviewing the whole evidentiary record, the Appeals Board agrees with the decision of the Administrative Law Judge that the claimant, James E. Pass, has failed to meet his burden of proof that he suffered a personal injury by accident arising out of and in the course of his employment with the respondent, City of Meade, on November 2, 1991.

Claimant claims that on November 2, 1991, he fell and injured his low back while shoveling snow and ice off a sidewalk while working for the respondent, City of Meade. At the time of the alleged accident, the claimant had been employed by the respondent as an operator in the power plant since June 1, 1991. During the first few days after the fall, claimant asserts that the symptoms were not severe enough to seek medical treatment. However, the symptoms progressively accelerated to the point that he sought medical treatment with H.M. Chalker, a doctor of chiropractic medicine, who had treated him for various conditions since 1985.

Dr. Chalker first saw the claimant on November 11, 1991. During this visit the claimant complained of back pain which radiated down his left leg. He told Dr. Chalker that he hurt his low back when he slipped on an icy sidewalk at his home on November 3, 1991. Claimant was also seen by Dr. Chalker on November 13, 1991, who at this time recommended that the claimant consult with a medical doctor in reference to his alleged injury because his symptomatology had not changed with treatment. Additionally, Dr. Chalker treated the claimant in 1989 prior to the claimant having to have surgery to repair a herniated disc in his low back. Accordingly, Dr. Chalker felt his present low back condition should be evaluated by a medical physician who had treated the claimant in the past for similar problems.

Dr. Chalker did not take the claimant off work, as he did not feel that the claimant's back condition was severe enough to miss work. Private health insurance claim forms were filed by Dr. Chalker for the treatment rendered on November 11, and November 13, 1991. Information was obtained from the claimant which indicated that he had hurt his

back at home and not at work.

Claimant claims that on November 6, 1991, four days after his alleged accident, he notified Macey Cook, his supervisor, that he hurt his back on November 2, 1991, while shoveling snow. Mr. Cook denies that claimant told him of such an accident and submits evidence in the form of time cards indicating that the claimant did not work either November 6, or November 7, 1991, because of the flu. Mr. Cook establishes that claimant performed all his normal work activities between November 2, 1991, and December 23, 1991, which included heavy tasks of carrying buckets of oil, mopping floors and being on his feet for a full shift walking a number of miles per day.

Claimant further argues that as a result of his increased back problems attributed to his initial injury of November 2, 1991, the pain intensified on December 23, 1991, when he caught his heel on the top step and twisted his back as he was coming out of the Veteran's Building in Meade, Kansas. He did not fall but felt a severe onset of pain in his low back. Claimant had to be helped to a van and had to ride home on his hands and knees. The pain grew increasingly severe and he had to go to the emergency room at the hospital in Meade, Kansas, and he was later transported to Wesley Medical Center in Wichita, Kansas, for treatment.

Dr. Gregg M. Snyder, a neurosurgeon, the same physician who performed surgery on the claimant in 1989, commenced treating the claimant for this new injury. On December 30, 1991, Dr. Snyder performed a repeat intralaminar discectomy in the same area as the claimant's previous back injury through the same incision. Dr. Snyder, on January 30, 1991, released the claimant to return to regular work on February 27, 1991.

In a workers compensation case, it is a well-established rule of law that the claimant has the burden to establish his right to an award for compensation by proving all the various conditions on which his right to a recovery depends. Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984). The claimant, in the case at hand, has the burden to persuade the Appeals Board that it is more probably true than not that he suffered a personal injury by accident that arose out of and in the course of his employment with the respondent. See K.S.A. 44-508(g). In reviewing the whole evidentiary record, the claimant has failed to meet this burden. The evidence presented does not prove that it is more probably true than not true that claimant fell and injured himself while working for the respondent on November 2, 1991.

Even if one would believe the claimant, the evidence does not present proof that he suffered any permanent disability as a result of such accidental injury. The evidence does establish that when he caught his heel on the step while leaving the Veteran's Building on December 23, 1991, he suffered a herniated disc which resulted in surgery. Therefore, the accident of December 23, 1991, was an intervening cause that was non-work related which resulted in permanent injury to the claimant. See Stockman v. Goodyear Tire & Rubber Co., 211 Kan. 260, 505 P.2d 697 (1973).

The Appeals Board finds that claimant's alleged personal injury did not arise out of and in the course of his employment with the respondent on November 2, 1991. Further, the Appeals Board finds that since the claimant has failed to prove this initial claim, it is unnecessary to decide the remaining outstanding issues in this case.

The findings as set forth in the Award of Administrative Law Judge Thomas F. Richardson dated December 14, 1993, are adopted by the Appeals Board and the Appeals Board affirms this Award in all respects.

AWARD

WHEREFORE, it is the finding, decision and order of the Appeals Board that the Award entered by Administrative Law Judge Thomas F. Richardson dated December 14, 1993, denying claimant, James E. Pass, workers compensation benefits is affirmed in all respects. The remaining orders of the Administrative Law Judge as contained in his Award of December 14, 1993, are adopted by the Appeals Board and incorporated herein by reference as if fully set forth.

IT IS SO ORDERED.

Dated this _____ day of May, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

cc: Mike Allen, PO Box 2827, Liberal, Kansas 67905-2827
William W. Jeter, PO Box 128, Hays, Kansas 67601
Allen G. Glendenning, PO Drawer 1110, Great Bend, Kansas 67530
Thomas F. Richardson, Administrative Law Judge
George Gomez, Director